IN COURT OF APPEALS FOR WASHINGTON STATE

DIVISION II

No. 414520-1-II 43712-1-II

JANICE GEARY,

Appellant

v

ING Bank, FSB, a Delaware corporation;

Aurora Loan Services LLC, a Washington Limited Liability Company;

Quality Loan Service Corporation of Washington; a Washington Corporation

Respondents

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF

WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in denying summary judgment to quiet title to Janice Geary against Aurora and Quality because they were claiming no interest in the Property at the time of the motion. (CP 1243 - 1252)

2. The trial court erred in denying summary judgment to quiet title to Janice Geary against ING Bank because the non-payment of the Promissory Note. (CP 1249, finding 4, lines 9 - 12; CP 1250, finding 5, line 4).

3. The trial erred in granting ING and Aurora's cross motion for summary on the issue of fraud in the inducement by finding that Aurora and ING did not intend to rely on any such false material factual representations, that any reliance thereon was not justifiable and reasonable, and that such material factual "representations" did not cause damage . (CP 1249, finding 4, lines 9 - 23)

4. The trial court erred in concluding that Geary was not entitled to summary judgment and that ING was entitled to summary judgment because Geary had not enjoined the sale. (CP 1250, Lines 6 - 13, finding 7, line 14 - 17, CP 1251, Lines 13, 14)

5. The trial court erred in denying judgment to Geary and granting judgment to ING Bank because it could not have acquired an interest in Geary's Property because the "corrective deed" was unlawful in violation of the Act, 61.24.030, et sec. (CP 185 - 187)

6. The trial court erred finding that Aurora and ING's representations did not violate the Washington Consumer Protection Act. (CP 1250, line 19 - 22; CP

1251, lines 1 - 5)

7. The trial court erred in dismissing the sixth cause of action in the complaint that Aurora and ING'S fraudulent attempt to avoid payment of excise tax. (Complaint, CP 10 - 11) (finding 9, CP 1251)

B. Issues Pertaining to the Assignments of Error

1. Did the trial court commit reversible error in deciding that the Geary was not entitled to against Quality and Aurora because at the time of the summary judgment motion neither was claiming an interest in the subject property? (Assignment of Error 1)

2. Did the trial court commit reversible error in denying summary judgment to quiet title to Janice Geary against ING Bank because the payment of the Promissory Note was not contested and evidence was before the court that non-payment of the note was based on misrepresentations by the defendants. (Assignments of Error 3, 4, 5, 7)

3. Did the trial court commit reversible error in denying summary judgment to Geary and granting summary judgment to ING because the trustee was without power to act in conducting a non-judicial sale in that Quality was appointed by an unlawful "beneficiary?" (Assignments of Error 3, 4, 5)

4. Was it reversible error for the trial court to conclude that Geary had to enjoin the sale in order to assert her remedy to invalidate the sale because the violations of the statute and broken succession of lawful beneficiaries made the sale void *ab initio*? (Assignments of Error 3, 4, 5, 6, 7)

5. Was it reversible error for the trial court to conclude that ING and Auora were entitled to summary judgment where the 'corrective' deed of trust conveying interest to ING has signed and recorded more than 15 days after the announcement of the sale in violation of statute? (Assignment of Error 5)

6. Did the trial court commit reversible error in concluding that the misrepresentations of Aurora as loan servicer were not relied upon by Geary and that such representations were not reliable because evidence in the record was not contested by evidence by the defendants? (Assignment of error 6)

7. Did the trial court commit reversible error in concluding that misrepresentations to Geary were violations of the Washington Consumer Protection act, were not material, nor to be relied upon, and caused no damage? (Assignment of error 6)

8. Did the trial court commit reversible error in concluding that the fraudulent attempt to avoid payment was not actionable in view of the fact that the claim was not about Geary's expectancy, but because the allegation was about "unclean hand" and breach of good faith. (Assignment of error 7)

III. Statement of the Case

A. Factual Background

Janice Geary (was then 'Valli' name on the Note and Deed of Trust) took out a loan to purchase her family's residence with Pierce Commercial Bank ("Pierce") (Pierce has since been investigated by the FBI, seized and then liquidated by the FDIC). She signed a promissory note ("Note") in favor of Pierce and Deed of Trust ("DOT") with Pierce as the beneficiary on February 28, 2005. (CP 80).

Servicing rights were assigned to Aurora Loan Services on March 17, 2005. (CP 108).

The "Corporation Assignment" of the DOT was executed on February 28, 2005, but not recorded until April 25, 2005 assigning the beneficial interest to Lehman Brothers Bank FSB (CP 113).

May 31, 2005, Mortgage Electronic Registration Systems (MERS) identifies in its Mortgage Identification Number (MINS) summary that Lehman Brothers Holdings is the new beneficiary. (CP 109-110). But there was no recorded assignment of the DOT.

The note was endorsed from Lehman Brothers Bank FSB to Lehman Holdings, Inc. (CP . 122) But no assignment of the beneficiary to the DOT was made or recorded, therefore there was a separation of the note from the beneficiary interest in the DOT.

November 23, 2005, Lehman Brothers Bank FSB attempts by corporate assignment of DOT to assign the beneficial interests to MERS, recorded on December 1, 2005. (CP 130) However, Lehman Brothers Bank FSB had no interest to transfer as it had assigned its interest in the DOT on May 31, 2005 to Lehman Brothers Holdings, Inc. (Krista Gingrich who purportedly signed the document for Lehman Brothers Bank FSB was actually an employee of

Aurora Loan Services, who was the 'loan servicer' and not the holder of the Note or DOT.) (CP 131)

September 15, 2008, Lehman Brothers Holding Inc. filed for protection in Bankruptcy Court, Southern District of New York (CP 139).

March 13, 2009, a Notice of Default created under the auspices of MERS. The notice was unsigned. (CP 142)

March 16, 2009, Sierra West signed an Appointment of Successor Trustee (recorded 3/17/2009) on behalf of MERS. (CP 146-147) The defendants have produced no evidence that Sierra West was an authorized officer of MERS.

April 14, 2009, Regina Garcia signed a "Corporate Assignment of Deed of Trust" from MERS to Aurora Loan Services LLC (recorded on 4/24/2009). (CP 153)). Regina Garcia was an employee of Aurora Loan Services. "Aurora was the Servicer of the loan Only" (CP1163-1164). The defendants have produced no evidence that Regina Garcia was an authorized officer of MERS. (CP 154)

September 21, 2009, the defendant ING filed an "unsecured" claim in Lehman Brothers Holdings bankruptcy. The unsecured claim included the loan of the Plaintiff Janice Geary, Account # 30352738, Loan amount of $620,000. (CP 156-163)

November 20, 2009, after numerous continuances Quality Loan Services conducted a sale of the Property. The sale was announced as "back to the beneficiary."

December 1, 2009, Quality Loan Service Trustee's Deed Upon Sale to Aurora Loan Services LLC. (CP 170-172)

January 7, 2010, Aurora Loan Services LLC files an Unlawful Detainer action in its name of as the title holder to the property. (CP 174-178)

April 23, 2010, Aurora Loan Services executes a Corporate Assignment of Deed of Trust to the defendant ING. This was not recorded until 5/24/2010, over six months after months after the supposed "trustees sale." (CP 180)

May 11, 2010, Court denies Aurora's Writ of Restitution based on defects in the statutory procedures. (CP 183)

May 24, 2010, Aurora Loan Services records a "Corrective Trustee's Deed Upon Sale" attempting to substitute ING as the purchaser instead of Aurora Loan Services. (CP 185-187)

February 28, 2011, more than a year after Aurora started its Unlawful Detainer Action and after receiving Valli's Counsel's trial brief, admitted that it had no standing to begin Unlawful Detainer action. As a condition granting Aurora's dismissal the trial judge awarded sanctions. (CP 189-182)

On 4/7/2011 ING filed a complaint for unlawful detainer in a separate proceeding, Pierce County Cause # 11-2-08149-0 claiming it had purchased at the foreclosure sale. This new action was authorised by Aurora who had just coincided having no interest in the property (CP1167)

B. Procedural History

Ms. Geary filed a complaint for Quiet Title and for in May 11, 2011, against the respondents. (CP 3) On August 22, 2011 Aurora filed a motion to dismiss the complaint joined by other defendants. On September 23, 2011, the trial court denied motions to dismiss the complaint. The case went through changes in trial judges, extensions of time and continuances of trial dates. On May 13, 2012, Geary moved for partial summary judgment declaring quiet title against all defendants. (CP 62) On May 18, 2012, the Defendant ING filed an answer to the summary judgment motion and filed for a cross motion for summary judgment dismissing the complaint. (CP 41) ING did not move from quiet title to the property in its own name. On July 2, 2012, the trial court denied the motion and granted all defendants' motion for dismissal of the complaint in a rather confounding order mixing conclusions of law and findings of fact on disputed evidence. (CP 1247).

On July 17, 2012, Geary filed for this appeal. (CP 1) After the notice of appeal was filed ING filed a motion with the trial court "for clarification of the summary judgment order."

On August 3, 2012, the trial court "clarified" its order without much clarification. This appeal followed.

V. SUMMARY OF THE ARGUMENT

This case involves an action to quiet title to property based on an invalid deed of trust sale. There are several issues raised in this appeal. One is that MERS was an unlawful "beneficiary" in whose name the foreclosure of Geary's property was begun. Our Supreme Court has already ruled that MERS is not a lawful Beneficiary under the Act in Bain v. Metropolitan Mortgage. Another, is even if MERS were a property beneficiary, the line of

succession among the "beneficiaries" was not property recorded under the Act. Another is that there was multiple separations of the Note and Deed of Trust. Another is that one of the "beneficiaries," Lehman Brothers Bank, FSB was assigned a beneficial interest by a non-beneficiary. Beyond that, at the foreclosure sale held on November 20, 2009, the property was sold to Aurora for its indebtedness. (CP 170-172) However, five months later the Trustee, Quality, who had been discharged by the statute when the sale was recorded attempted to act again by filing a "Corrective Deed of Trust Upon Sale" award title to the Property to ING (CP 185-187) ING to this date has produced no evidence of holding the note or being a beneficiary under the DOT.

The byzantine fabrication of documents and beneficiaries by Quality, Aurora and ING to deprive Geary of her property rights is self evident in the documentation of this case.

ARGUMENT

Standard for Summary Judgment

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied. *Jacobsen V. State 89 Wn.2d 104, 569 P.2d 115; Balise V. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); 45 Wash. L. Rev. 4, 5. See Also 6 J. Moore, Federal Practice 56.11[3], 56.15[3].* It is in this context that the appellate court's review the trial court's summary dismissal. The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom v. Burger King 135 Wn.2d 658 663 (1998).* All inferences from the evidence presented by the parties must be given to the non-moving party. *Lamon v. McDonnell Douglas Corp., 91 Wn.2d 3,15, 349, 588 P.2d 1346 (1979), (citing Morris v. McNicol, 83 Wn.2d at 494-95).*

Facts Not At Issue

This case is not about the payment or non-payment of the promissory note. It is solely about the invalidity of the non-judicial foreclosure of the Geary Property. The trial judge emphasized that the note was in default. That has never been in contention. This case is about the actions of the defending parties who caused the default. It is about a "trustee" who was without powers to act, and acted beyond the scope of its duties - even if it did have the power to act. The Washington Deed of Trust Act is designed to improve the efficiency of foreclosure and assure title stability. However, procedural irregulaties void a non-judicial foreclosure sale. *In re Schwartz , 954 F.2d 569, 570-71 (9th Cir. 1992); Cox v. Helenius , 103 Wn.2d 383, 388.*

693 P.2d 683 (1985). A procedural irregularity defeats the trustee's authority to sell the property at a non-judicial sale. *Udall v. T.D. Escrow Servs., Inc. 159 Wn. 2d. 903, 912* (2007)

A. THE TRIAL COURT SHOULD HAVE GRANTED SUMMARY JUDGMENT AGAINST QUALITY AND AURORA AS THEY NEITHER CLAIMED AN INTEREST IN THE PROPERTY AT THE TIME OF THE RULING.

At the time of the hearing on the summary judgment motion neither Quality nor Aurora was claiming an interest in the property. Therefore, quiet title against these defendants should have been granted.

B. NEITHER AURORA OR ING WERE LAWFUL BENEFICIARIES UNDER THE DEED OF TRUST ON GEARY'S PROPERTY AND COULD NOT HAVE DIRECTED A NON-JUDICIAL FORECLOSURE UNDER RCW 61.24.030.

1. MERS was not a lawful "beneficiary" under the Washington Deed of Trust Act and therefore could not have appointed Quality Loan Service as a lawful Trustee and could not have directed any Trustee to conduct a non-judicial foreclosure.

In the definitive case of *Bain v. Metropolitan Group, No. 86206-1; (consolidated with No. 86207-9) decided August 16, 2012* our Supreme Court decided that Mortgage Electronic Registrations System (" MERS") could not be a

beneficiary under the Washington State Deed of Trust Act, RCW 64.04, and therefore had no power to appoint a successor trustee and certainly had no power to assign the DOT to Aurora. The very articulate and thorough decision of the Court requires no further exposition by this counsel.

a. Geary Was Not Required to Enjoin the Sale Because it Was *Void Ab Initio*

The trial court based part of its decision on the fact that Ms. Geary did not bring an action to enjoin prior to the sale according to statute. However, an action which is void *ab initio* does not require any response, it is deemed not to have any legal effect. *Wheaton v. the Department of Labor and Industries et al., Respondent, 40 Wn.2d 56 (1952)*

Black's Law Dictionary defines void as: **Void.** Null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended.

For the reasons discussed below the act of the supposed 'Trustee' Quality were invalid from the beginning.

One cannot waive a void sale. The Court in *Albice v. Premier Mortgage Servs. Of Wash., Inc.157 Wn. App. 912 (2010)* . . . stated

> Waiver, however, cannot apply to all circumstances or types of post sale challenges. RCW 61.24.040(1)(f)(IX) provides that [f]ailure to bring . . . a lawsuit may result in waiver of any proper grounds for invalidating the Trustee's sale. The word 'may' indicates the legislature neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.

The injunctive remedy set forth in the statute is designed to bar any post sale actions which were defective in the notice of the sale. RCW 61.24.040 (a) requires the "trustee" perform the duties requisite to a non-judicial sale. An unlawful trustee has no right or power to conduct the

sale. Courts have distinguished between 'notice' defects, that is the tasks performed pursuant to statute and 'structural defects', violation of the statute[1]

c. The 'Corrective Trustee's Deed Upon Sale' was a post sale action and could not have been enjoined.

The trial court did not specifically address the post sale action of the five month beyond the statutory requirement of a trustee's deed upon sale, even though it made findings in other areas. However, a party is not required to be prescience in protecting her rights. There is no way that she could have foreseen the attempt to change the sale document despite the many strange and unsavory acts of the parties defendant in this case. RCW 61.24.040 (1)(f)(IX) only applies to restrain the sale - of course it does not, and cannot, determine whether post sale activity is lawful because at the point of sale the duties of the trustee have been extinguished. RCW 61.24.050. Ergo, the trustee, even if in this case it was a lawful trustee prior to the sale, it held no power after recording the Trustee's Deed Upon Sale on December 1, 2009 to execute or record any document. (CP 170-172)

2. Aurora was not a lawful "beneficiary" because it did not hold the note and because it received its assignment from MERS and others who were not a lawful beneficiaries

At the time of the non-judicial sale of the Property, Aurora was ostensibly the beneficiary. However, Aurora purportedly received its beneficial interest from MERS who by law had no power or right in the DOT. *Bain, supra*. But Aurora also never became holder of the Note. These are two reasons Aurora had no power to direct a sale of the Property, nor to

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[1] In considering a foreclosure statute in Michigan the U.S. Court of Appeals for the Sixth Circuit set forth the differences in voidable versus void ab *initio*. They held that "structural defects" as opposed to "notice" defects "go to the very heart of defendant's ability to foreclose . . . in the first instance." *Mitan v. Fed. Home Loan ,No. 12-1169, decided December 12, 2012.* While notice defects require the party to initiate action, structural defects render the foreclosure absolutely void.

participate in the process of non-judicial proceedings. The entire premises of the *Bain* decision was that MERS never possessed or owned the instrument for the underlying obligation.

> Under the plain language of the deed of trust act, this appears to be a simple question. Since 1998, the deed of trust act has defined a beneficiary as the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation. Laws of 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2).8 Thus, in the terms of the certified question, if MERS never held the promissory note then it is not a lawful beneficiary. *Bain* at page 14.

There were multiple breaks in the chain of unity between the note and DOT dating back to May 2005 when the Note was endorsed to Lehman Brothers Bank to Lehman Brothers Holdings without assigning the DOT along with it. (CP 122). In November of 2005, after having transfered its interest in the Note to Lehman Brothers Bank attempts to transfer its "beneficial" interest in the DOT to MERS. (CP 130). (Lehman Brothers Holdings, who is then the holder of the Note files for protection under the Bankruptcy laws and lists the Note as "unsecured" asset.) (CP 139). At this point Lehman Brothers Holdings is *judicial estopped* from claiming that Lehman Brothers Bank holds the note. *Judicial Estoppel* prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007).*

Not only is the note not assigned with the beneficial interest, but Lehman Brothers Bank, is estopped in its attempt to assign the beneficial interest to MERS. If a party has knowledge which would have put him on inquiry, such as would have led to a knowledge of the facts, he is estopped by the position of his predecessor. *Humphrey v. Jenks, 61 Wn.2d 565 379 P.2d 366; (1963); Trans West v. Boise Cascade 525 14 Wn. App. 520, 544 P.2d 43* (1975)

There is no element of intent in *judicial estoppel,* the inconsistent position only has to be advantages to the party. *Cunningham v. Reliable Concrete Pumping, Inc. 126 Wn. App. 222, (2005)*

At the point where the unity was broken the security interest of the DOT and the obligation under the Note, the non-judicial powers could not have been acted upon by any of the actors in this drama. The statutory strictures of the Act must be strictly adhered to because non-judicial foreclosures lack the oversight inherent in judicial foreclosures. The courts strictly apply and interpret the Act in the borrower's favor. *Albice; Cox CHD, Inc. v. Boyles, 138 Wn. App. 131, 137, 157 P.3d 415 (2007).* In Washington, a deed of trust as a mortgage creates nothing more than a lien in support of the debt which it is given to secure. *Bain,* at page 6.

According to Powell on Real Property,

> It must be remembered that the mortgagee has two interests: (1) the debt or obligation which is owned to him, and (2) the security interest in land represented by the mortgage.... In fact, the primary interest is the personalty debt obligation. The interest in land which is available in case security is necessary because of the debtor's default is considered as collateral interest. Much trouble has been caused by mortgagees attempting to transfer only one of these two interests. Where the mortgagee has "transferred" only the mortgage, the transaction is a nullity and his "assignee," having received no interest in the underlying debt or obligation, has a worthless piece of paper. *Powell on Real Property: Michael Allan Wolf Desk Edition § 37.27 (2] (LexisNexis Matthew Bender 2010)*

While Aurora may claim the MERS showed an interest by Aurora in the Note, a party who never takes possession of the Note cannot be a beneficiary and holder or owner as required under RCW 61.24.005 (2). "'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." RCW 62A.3-201 (a);) "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." RCW 62A.3-203(a)

Aurora never possessed the note. It had no rights in the security instrument because of the separation of unity with the DOT. The very notion that a party can foreclose without ownership and possession of the note puts a maker of a note in double jeopardy. Cases from

other jurisdictions emphasize that a duality of ownership makes it theoretically possible for double exposure for the debt.[2]

3. The foreclosure process was fatally flawed because the chain of interests, and powers, in the Deed of Trust were not accurately recorded according to statute, RCW 64.04.010, RCW 64.04.020

Another defect in the process of "foreclosure" was that there is no recorded power of attorney and no record of the appointment of Sierra West as attorney-in-fact for Mortgage Electronic Registration Systems (MERS) in violation of the "rule of equal dignities" [3] RCW 64.04.010 requires all conveyances of interest in real estate to be by deed. RCW 64.04.020 requires the deed be in writing and acknowledged. Therefore, in order to record the appointment of successor trustee the power of attorney must have been in writing and recorded. The defendants have produced no such document.

While the Court in the *Bain* case did not directly deal with the requirement of successive recordings, it did touch upon the subject. It is simple: statutes require recordings of any *interest*

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Massachusetts U.S. District Court for Court in *Culhane v. Aurora Loan Services, 826 F.Supp.2d 352 (2011)* "Were a mortgagee without an interest in the debt able to exercise the power of sale, the note would be left outstanding as a valid obligation of the mortgagor to its holder. Cf. Cooperstein v. Bogas, 317 Mass. 341, 344, 58 N.E.2d 131 (1944) (recognizing double liability as a concern in a reach and apply case). "[T]he holder of the note could attempt to collect on the note after the mortgage was foreclosed subjecting the mortgagor to double liability." Adamson, 2011 WL 4985490, at *9; *see Residential Funding Co., LLC v. Saurman,* 292 Mich.App. 321, 338-39, 807 N.W.2d 412 (Mich.Ct.App.2011)

3

Equal-dignities rule refers to a legal doctrine requiring an agent to perform all acts authorized by a principal. An agent can perform those acts only if the agent's authority is set forth in writing. Equal-dignities rule is essentially a corollary to the statute of frauds. Under this rule, a contract would be void unless reduced to writing. For example, those contracts subject to the statute of fraud, authority to enter into such a contract must also be in writing. However, under the equal dignities rule, an agent cannot usually estop his/her principal by conduct alone. [Shoals v. Home Depot, Inc., 422 F. Supp. 2d 1183 (E.D. Cal. 2006)].

in real property. RCW 64.04.010. Such deed must be in writing, signed, and acknowledged. 64.04.020. Every interest in real estate must be recorded. *Berg v. Ting, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).* A security interest in real estate must be recorded in order to be perfected. *Freeborn v. Seattle Trust 94 Wn.2d 336, 617 P.2d 424 (1980)*

This statutory requirement also requires powers of attorney by which instruments are executed under the same requirements of a deed. In this case, there were multiple signatures by purported agents without the requisite recordings.

> RCW 65.08.060 (3) The term "conveyance" includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, ***including an instrument in execution of a power,*** although the power be one of revocation only, and ***an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien***; except a will, a lease for a term of not exceeding two years, and an instrument granting a power to convey real property as the agent or attorney for the owner of the property. "To convey" is to execute a "conveyance" as defined in this subdivision.

Neither the power of attorney to Krista Gingrich (who was actually an employee of Aurora) who purportedly signed the document for Lehman Brothers Bank, nor a power of attorneyt to Aurora was recorded. In fact, none of the purported officers of MERS, Lehman, or Aurora ever produced evidence of authority to sign any of the documents in this case.

Even if the unity of the security and the obligation had not been broken, the process which started with the Notice of Default was fatally flawed. The notice of default which is required to commence any non-judicial foreclosure was defective in that it a) had no signature; b) the notice of default was dated on March 13, 2009, which was prior to the appointment of Quality Loan Services as successor trustee was recorded on March 17, 2009. At time the Notice of Default (CP 142) was served Transnation Title Company was the trustee (Original Deed of Trust (CP 80) Obviously a trustee who does not exist at the time the Notice of Default was generated has no power to act under the Statute. RCW 61.24.005 (16) defines a " Trustee under

the statute means the person designated as the trustee in the deed of trust or appointed under RCW 61.24.010(2)." (MERS as "beneficiary" purportedly designated Quality as the successor trustee, however, the legal ability of MERS to be a beneficiary as discussed above.) Again, as the Court stated in *Alblice v. Premier Mort., supra,* the requirements of the Deed of Trust Act must be strictly applied and interpreted.

The purported sale of the property was after a series of continuances beginning on July 24, 2009 and purportedly sold on November 20, 2009. (CP 170-172) These are not recited in the Trustee Deed of Sale. "To balance the procedural safeguards with the interests of a purchaser, the Act requires a foreclosing trustee to issue a deed that recites facts showing that the sale was conducted in compliance with statutory requirements. RCW 61.24.040(7)." *Albice v. Premier Mortgage, supra* .

The cumulative violations of the statute means that there was no retained interest, power of authority under, the DOT any of by any of the party defendants.

When a deed of trust is foreclosed, the trustee sells only such title as the grantor held at the time the deed was granted. *Mann v. Household Fin. Corp. III, 109 Wn. App. 387, 393* The trustee has no powers except those conferred by the deed of trust. A non-judicial sale under the Act which is conducted by a trustee who does not comply with the strict requirements of the statute and who does not have actual authority to conduct the sale is void. *Udall v. T.D. Escrow Servs., Inc.* 132 Wn. App. 290 (2006), *Feldman v. Rucker*, 201 Va. 11, 109 S.E.2d 379 (1959).

C. EVEN IF THE BENEFICIARY AND THE TRUSTEE HAD THE POWER TO ACT, THE DEFENDANT ING BANK, FSB ACQUIRED NO INTEREST IN THE PROPERTY BECAUSE ' CORRECTIVE' DEED WAS INVALID ON ITS FACE BECAUSE IT WAS A SUCCESSIVE CONVEYANCE BEYOND THE PERIOD SET FORTH IN THE STATUTE.

1. The original Trustees sale, even if valid, was final within 15 days of the sale" in accordance with RCW 61.24.050 (1) and not subject to revision with the "Corrective Trustee's Deed Upon Sale

ING acquired no title or interest in the Property because through the "Corrective Deed of Trust Upon Sale." The process of the sale is not only void because of the discussion of the issues above, but also defective in the sale itself. The "trustee" Quality Loan Services conducted the "sale" on November 20, 2009. The purported Trustee executed a "Trustee's Deed Upon Sale" dated November 23, 2009 and recorded it on December 1, 2009 which recited Aurora Loan Services as the "Grantee is the Foreclosing Beneficiary". See IRS 1099 form shows Aurora as Beneficiary (CP 1193). [Again the parties have taken inconsistent positions on this issue] But six months after the sale Quality tried a "do over" by making out the "corrective" trustee's deed to show that ING Bank FSB was the purchaser. (CP 185-187). It cannot escape the Court's attention that the RCW 61.24.040 (4) through (6) requires the trustee's sale be at public auction at a public place. There was no mistake about who the "first" purchaser was because it was announced as a credit bid.

Once the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. RCW 61.24.050 (1). Once the deed has been delivered and recorded the sale is final. *Udall v. T.D. Escrow Servs., Inc. 132 Wn. App. 290 (2006).* No one has any rights in the property after the recording of the trustee's deed. *In re Trustee's Sale, 102 Wn. App. 220 (2000).*

Only by express reservation announced prior to the sale can the seller reserve the right to review and reject bids after the auctioneer closes the sale. *Cont'l Can Co. v. Commercial Waterway Dist. No. 1* , 56 Wn.2d 456, 458-60, 347 P.2d 887 (1959). Upon the recording of the

first trustee's deed, all the powers of the trustee, whatever power even existed in this case, were extinguished.

2. Even if it were a lawful Trustee, Quality Loan Services' attempt to recast the sale under the "Corrective Deed" was a violation of its duties of good faith and was a fraud upon the treasury of Pierce County.

Quality conducted and announced the sale on November 20, 2009 to Aurora. It followed up on this by executing and recording a trustee's deed (CP 170 - 172) Then Quality attempted a "do over" it by giving a "Corrective Trustee's Deed Upon Sale." The manipulation of changing the purchaser was obviously a fraud upon Pierce County and designed deceive Geary into believing the sale was legitimate and to avoid paying transfer taxes. The excise tax affidavit for the "Corrective Trustee's Deed Upon Sale" listed a non-existent exemption under the code. ING cannot be a participate in the farce of the "Corrective" sale" and now claim an interest in the property.

> Courts are ordained for the enforcement and vindication of the law and legal rights. They never aid anybody in his effort to violate law nor give him the benefit or fruit of his own violation thereof. No court of law or equity will enforce or give any right upon an illegal contract. Following the same principle, a court will not allow the use of its powers and process to obtain a benefit founded directly upon a breach of law by the applicant therefor. Courts of Equity go still further and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief." *Cooper & Company v. Anchor Securities, 9 Wn.2d 45 (1941)*, **quoting 1 Story's Equity Jurisprudence (14th ed.), §§ 98, 100, 102**.

ING claimed an interest in the loan of Plaintiff on September 21, 2009 when it filed a claim in the bankruptcy of Lehman Brothers Holdings. (CP 139). ING classified the claim as "unsecured". ING revealed through this action that it knew the tortured history of these loans, including the Plaintiff's. Thus even if the several defects in the transactions were not present

ING knew it weren't a bona fide purchaser of the property 6 months after the original "trustee's sale." A bona fide purchaser is one who purchases property without actual or constructive knowledge of competing interests and pays the vendor valuable consideration. *Glidden v. Mun. Auth. of Tacoma, 111 Wn.2d 341, 347, 758 P.2d 487 (1998); Glaser v. Holdorf, 56 Wn.2d 204, 209, 352 P.2d 212 (1960).* A purchaser is on notice if he has knowledge of facts sufficient to put an ordinarily prudent man on inquiry and a reasonably diligent inquiry would lead to the discovery of title or sale defects. *Steward v. Good, 51 Wn.App. 509, 513, 754 P.2d 150 (1988) (citing Peterson v. Weist, 48 Wash. 339, 341, 93 P. 519 (1908)).*

In an effort to obscure the false purchase by ING, Aurora attempted to assign the Valli DOT to ING on April 23, 2010. (CP 180). Since the purported Trustee's Sale had taken place on 11/20/2009, if the sale was indeed legitimate, there was no existing DOT to assign because it had been previously foreclosed. This is another farce among the defendants.

D. PLAINTIFF'S CLAIMS OF MISREPRESENTATION WERE NOT DISPOSABLE IN SUMMARY JUDGMENT AS THE FACTS WERE CONTESTED BY GEARY

1. The findings of fact by the trial judge were inappropriate because the evidence was disputed.

The trial judge entered a number of "findings" in the summary judgment order. It is the duty of the trial court to consider all evidence and all reasonable inferences therefrom most favorable to the nonmoving party. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 951, 421 P.2d 674 (1966). A summary judgment cannot be entered if there be a genuine issue as to any material fact. *Maki v. Aluminum Bldg. Products* 73 Wn.2d 23 (1968).

The trial judge in dismissing Geary's claim for fraud in the inducement decided:

- "Aurora and ING did not intend Plaintiff to rely on any such allegedly false material factual representations"

First, neither Aurora nor ING brought forth evidence that the false material was unintentional. A material fact is one upon which the outcome of the litigation depends. The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party. *In re Estate of Black 153 Wn.2d 152, 161 (2004);* see also Civil Rules (CR) 56 (c). A naked assertion of unresolved factual questions is not sufficient to oppose a motion for summary Judgment. *Jacobsen v. State 89 Wn.2d 104, 569 P.2d 1152 (1977)*; *Bates v. Grace United Methodist Church, 12 Wn. App. 111, 115, 529 P.2d 466 (1974).*

It is also unclear why this finding was made - was it because these representations were made through an agent? If so, it is a wrongful finding. Where a party exclusive deals with an agent and is not provided access to the principal for negotiations the principals will be Bound. *Neva F. Gnash 44* Wn.2d 312 (1954). If Aurora was not acting on behalf of ING then it acted alone and is therefore liable. An agent who conceals the fact of his agency and contracts as the ostensible principal will be personally liable. *Neva, supra.* However, throughout this case ING has adopted all of the machinations of Aurora and Quality in seeking to foreclosure on the DOT. A principal is held liable for the tortious acts of the agent if such acts are performed within the scope of employment, although the master may not know or approve of them. *Titus v. Tacoma Smeltermen's Union Local No. 25, 62 Wn.2d 461, 383 P.2d 504 (1963).*

If the finding is merely that Geary didn't rely on the misrepresentations, the declaration of Ms. Geary sets out in great detail her reliance upon the misrepresentations. (CP 908 - 912) She would not have defaulted and would not have jumped through a series of hoops designed by Aurora to obfuscate the process that led to the foreclosure action. (CP 911 -912) An erroneous representation made in ignorance of its truth is fraudulent even in the absence of intent to deceive, and constitutes sufficient evidence to uphold a finding of a misrepresentation.

Alexander Myers & Co. V. Hopke 88 Wn.2d 449, 565 P.2d 80 (1977). Misrepresentations frequently have the effect of causing the other party to fail to use the means of knowledge within (her) Power. *Coson v. Roehl*, 63 Wn.2d 384, (1963). A wrongdoer cannot defend his wrongful actions by calling attention to his victim's Gullibility. *Jenness v. Moses Lake Devel. Co. 39 Wn.2d 151 (1951).*

The trial judge found that such representations did not cause Geary damage. However, she stated that if she was not lured into the default and if she did not have to run the obstacle course set up by the modification process, she would not have been sent into foreclosure. *Salter v. Heiser, 39 Wn.2d 826, 239 P.2d 327 (1951).* Where a party seeks to recover damages not inherent in the "benefit of bargain" rule, (she) will be awarded damages for all losses proximately caused by defendant's misrepresentation. *Chapman v. Marketing Unlimited, 14 Wn. App. 34, 539 P.2d 107 (1975).* What she has now lost is equity, and charged interest, attorney fees, trustee fees, attorney fees in contesting this action and the unlawful detainer action.

2. The Misrepresentations by the "Servicer" Aurora violated the Washington Consumer Protection Act

Ms. Geary testified under declaration of the many representations made to her by agents of Aurora , among them:

a. She should go into default in order to receive a loan modification; not to worry about the effect on her credit rating because Aurora would take care of it;

b. Aurora failed to acknowledge multiple transmissions of documents to them; instructing her to change items on her application for modification that were untrue;

c. Re-calculation of her income to deny her application; assuring her they had authority to approve a loan modification when they couldn't even determine who owned the loan. (CP 911 -912, 936, 1155 - 1156).

Whether a business act or practice is actionable under the Consumer Protection Act (RCW 19.86) is reviewed as a question of law.

Courts have found unfairness where conduct offends public policy, is immoral, unethical, oppressive, or unscrupulous, or causes substantial injury to consumers. *Blake v. Federal Way Cycle Ctr., 40 Wn. App. 302, 310, 698 P.2d 578, (1985) (quoting FTC v. Sperry & Hutchinson Co., 405 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1973)).* To show an act was deceptive under the CPA, a plaintiff need not show intent to deceive, only the capacity to deceive a *substantial portion of the public. Hangman Ridge v. Safeco Title,* 105 Wn.2d 778 (1986) at 785. *Eastlake Constr. Co., Inc. v. Hess, 102 Wn.2d 30, 50, 686 P.2d 465 (1984).*

Generally, whether the public interest is affected is a question for the trier of fact. *Hangman Ridge, 105 Wn.2d at 789.* An act or practice is injurious to the public interest if it [i]njured other persons or had [or has] the capacity to injure other persons. RCW 19.86.093(3).

A party to a contract who is subject to a general duty to disclose must disclose all relevant facts and circumstances affecting the contract, including the existence and application of relevant statutory provisions.

Even were there was no fiduciary relationship, the law requires that contracting parties act in good faith and not deceive one another. *Liebergesell v. Evans,93 Wn.2d 881, 613 P.2d 1170 (1980). Kammerer v. Western Gear Corp.* 27 Wn. App. 512, 618 P.2d 1330 (1980). Fraud by affirmative misrepresentation also violates this duty of good faith. *Kammerer, supra.* The maxim of "clean hands" fundamentally was conceived in equity jurisprudence to refuse to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful,

unconscionable or inequitable conduct in the matter with relation to which he seeks relief." *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co. 98 F 2d 416 (8th Cir. 1938)*, cert. denied 305 US 650, 59 S. Ct. 243, 83 L. Ed. 240 (1938), reh. denied 305 US 676, 59 S Ct. 356 83 L. Ed. 437 (1939); *General Excavator Co. v. Keystone Driller Co. 65 F 2d 39 (6th Cir. 1933)*, cert. granted 289 US 721, 53 S. Ct. 791, 77 L. Ed. 1472 (1933), affd 290 US 240, 54 S. Ct. 146, 78 L. Ed. 793 (1934).

The trial court specifically refused to find that Aurora and ING did not make the misrepresentations and refused to find that they were not material nor false. (CP 1249, LINES 12 - 17) And the trial court refused to find that the representations were not relied upon. (CP 1251, lines 18 - 19). A trial court's failure to make an express finding on a material issue will be deemed a finding against the party having the burden of proof. *Sandler v. U.s. Development Co., 44 Wn. App. 98, 721 P.2d 532 (1986)*

The machinations that Ms. Geary was put through in communicating with Aurora was, if not intentionally designed to frustrate and delay her payments on the mortgage, had such an effect and resulted in the invalid attempt to foreclose on her property.

E. AURORA AND ING'S MISCONDUCT IN ATTEMPTING TO AVOID EXCISE TAX DEPRIVES ITS OF ACCESS TO ANY RELIEF

The trial judges finding that Geary did not have any expectancy under the tax fraud perpetrated upon the County in filing the false tax affidavit did not address the issue presented by the complaint nor in briefing before the court (CP 11 - 12, 62- 75).

Aurora and ING tried to manipulate the recording of the "Corrective" Deed Upon Sale by submitting a tax affidavit to the county contending that this was a first sale and not a resale. (CP 187). In addition the revenue code cited was not a valid code. A Deed Upon Sale had been recorded with the tax exemption about six months before. (CP 170 - 172). The issue presented

is a universal one, courts are ordained for the enforcement and vindication of the law and legal rights. They never aid anybody in an effort to violate law nor give the benefit or fruit of such a violation thereof. No court of law or equity will enforce or give any right upon an illegal act. Following the same principle, a court will not allow the use of its powers and process to obtain a benefit founded directly upon a breach of law by the applicant therefor. Courts of Equity go still further and refuse relief, even in cases of equitable right, if the applicant has been guilty of fraud or misconduct in or about the matter in respect to which he seeks relief. *J. L. Cooper & Co. v. Anchor Securities Co., 113 P.2d 845, 9 Wn.2d 45 (Wash. 1941).*

CONCLUSION

Ms. Geary asks the Court to reverse the summary judgment dismissing the complaint and reverse the summary judgment in favor or Quality, Aurora and ING, to declare the trustee's sale void and to quiet title in her favor and against Aurora and ING. The foreclosure is void because of the invalid assignment of the deed of trust to MERS; the commencement of the non-judicial process by an unlawful beneficiary, MERS; the conducting of the sale by an unlawful trustee; the deception and misrepresentation which lead to the default of Ms. Geary on her loan, and the unlawful attempts to change the nature of the sale more that 15 days after a Trustee's Deed Upon Sale was recorded per statute.

Ms. Geary also asks the Court to reverse the summary judgment regarding the misrepresentation and Consumer Protection claims and to return those issues to the trial court for trial on the issues presented in the complaint.

Respectfully submitted this day of January, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on 14 the day of January, 2013, he hand delivered an original Brief of Appellants and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery placed with Federal Express for next day delivery to each of the following parties and their counsel of record:

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